

## Intellectual Property Brief

---

Volume 4 | Issue 3

Article 2

---

7-10-2013

# Of Oatmeal, Bears, and NPEs: Ensuring Fair, Effective, and Affordable Copyright Enforcement Through Copyright Insurance

Evan McAlpine

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/ipbrief>



Part of the [Law Commons](#)

---

### Recommended Citation

McAlpine, Evan. "Of Oatmeal, Bears, and NPEs: Ensuring Fair, Effective, and Affordable Copyright Enforcement Through Copyright Insurance." *Intellectual Property Brief* 4, no. 3 (2013): 19-35.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Intellectual Property Brief* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

---

## Of Oatmeal, Bears, and NPEs: Ensuring Fair, Effective, and Affordable Copyright Enforcement Through Copyright Insurance

# OF OATMEAL, BEARS, AND NPEs: ENSURING FAIR, EFFECTIVE, AND AFFORDABLE COPYRIGHT ENFORCEMENT THROUGH COPYRIGHT INSURANCE

by Evan McAlpine<sup>1</sup>

## ABSTRACT

Increasing copyright infringement and high litigation costs have left many independent content producers without the means to effectively commercialize their creations. However, this problem can be solved with inspiration from the patent world, where non-practicing entities (NPEs) have, among other things, given independent inventors additional options for commercializing their inventions. If adopted by the copyright world, an NPE would also provide more enforcement options to creators of copyrighted material, but would best do so by selling copyright insurance. This would allow it to legally pursue infringers on behalf of its insured clients, and give clients maximum control over their content. This system will eliminate rampant copyright infringement while simultaneously opening new markets for insurance providers, increasing the value of copyrighted works, and making copyright enforcement more efficient.

## INTRODUCTION

Matthew Inman runs an online cartoon called “The Oatmeal.”<sup>2</sup> His business model is simple: he draws cartoons and monetizes them via merchandising and ad revenue.<sup>3</sup> In early 2010, though, Inman learned that a content aggregator,<sup>4</sup> funnyjunk.com, was displaying hundreds of copies of his work,<sup>5</sup> without

link-backs or attribution. Accordingly, he requested the site’s administrator remove the infringing copies via a DMCA takedown notice.<sup>6</sup>

After fruitlessly sending these requests for a year,<sup>7</sup> Inman grew frustrated with the Digital Millennium Copyright Act (DMCA) process, and resorted to the power of the press to protect his intellectual property.<sup>8</sup> He wrote two blog-posts on his website<sup>9</sup> ranting about his stolen comics, and then let the issue rest.<sup>10</sup> One year later, though, he received a letter from FunnyJunk’s attorney, demanding him to remove his posts about FunnyJunk and to pay twenty-thousand dollars for alleged defamation and false advertising.<sup>11</sup> In the following weeks, Inman retaliated with more blog posts and then raised more than ten times the requested amount, which he donated to charity to spite FunnyJunk.<sup>12</sup> He also sent FunnyJunk’s attorney a drawing of his mother attempting to seduce a bear, along with several pictures of the charity money.<sup>13</sup> FunnyJunk then sued Inman for trademark infringement and inciting others to cyber-vandalism.<sup>14</sup> After some brief legal foot-stepping, FunnyJunk ultimately honored Inman’s original request by blocking its users from accessing his content and it then dismissed its lawsuit.<sup>15</sup>

---

1. Candidate, M.S., Intellectual Property Management and Markets at the Illinois Institute of Technology. Thanks to Professor Edward Lee, Professor David Schwartz, and Grant Schakelford for their teaching, guidance, and coaching throughout the writing process. Thanks also to my brother, Bob McAlpine, for providing the inspiration for this article.

2. Matthew Inman, *About the Oatmeal*, THE OATMEAL, <http://theoatmeal.com/pages/about> (last visited Feb. 21, 2013).

3. Danny Bradbury, *The Oatmeal beat Funnyjunk, but other cartoonists aren't so lucky*, GUARDIAN (June 21, 2012, 1:55 AM), <http://www.guardian.co.uk/technology/2012/jun/21/oatmeal-carreon-comics-property>.

4. A content aggregator is a website that does not produce any content, but rather assembles content from other sources into one place.

5. Matthew Inman, *What should I do about FunnyJunk.com*, THE OATMEAL, <http://theoatmeal.com/blog/funnyjunk> (last visited Feb. 21, 2013).

---

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Dan Mitchell, *Bear Seduction and the Copyright Conundrum*, SFWEEKLY BLOGS (June 12, 2012, 11:00 AM), [http://blogs.sfwEEKLY.com/thesnitch/2012/06/bear\\_seduction\\_and\\_the\\_copyright.php](http://blogs.sfwEEKLY.com/thesnitch/2012/06/bear_seduction_and_the_copyright.php).

12. Matthew Inman, *FunnyJunk is threatening to file a federal lawsuit against me unless I pay \$20,000 in damages*, THE OATMEAL, [http://theoatmeal.com/blog/funnyjunk\\_letter](http://theoatmeal.com/blog/funnyjunk_letter) (last visited Feb. 21, 2012).

13. Matthew Inman, *As promised, here's the photo of \$211,223.04 in cash we raised for charity*, THE OATMEAL, [http://theoatmeal.com/blog/charity\\_money](http://theoatmeal.com/blog/charity_money) (last visited Feb. 21, 2012).

14. Complaint at 1, Carreon v. Inman, No. 12-CV-03112 (N.D. Cal., June 15, 2012).

15. Michael Cavanaugh, *'The Oatmeal' v. FunnyJunk Lawyer: Why Charles Carreon dropped his Indiegogo charity lawsuit*, WASH. POST BLOG (July 6, 2012, 12:43 AM), [http://www.washingtonpost.com/blogs/comic-riffs/post/the-oatmeal-v-funnyjunk-lawyer-why-charles-carreon-dropped-his-indiegogo-charity-lawsuit/2012/07/06/gJQAND0pQW\\_blog.html](http://www.washingtonpost.com/blogs/comic-riffs/post/the-oatmeal-v-funnyjunk-lawyer-why-charles-carreon-dropped-his-indiegogo-charity-lawsuit/2012/07/06/gJQAND0pQW_blog.html).

While few could have predicted that a simple copyright dispute would escalate to such comical proportions, the story nonetheless illustrates a salient issue in modern copyright enforcement. The Internet allows individuals to engage in mass copying and redistribution with only a few mouse-clicks, while owners of copyright-protected material lack comparable countermeasures. For example, copyright owners bear the burden of identifying and policing infringers,<sup>16</sup> but most are unable to afford the cost of enforcing their rights against these copiers.<sup>17</sup> Under the current system, a mass infringer operates at little cost, while the copyright owner must spend a substantial sum to protect his rights.<sup>18</sup> While copyright protection may be considered just another cost of doing business for large organizations such as Disney or Universal, the expense of litigation is often an insurmountable obstacle to an individual whose rights have been violated.<sup>19</sup>

A similar situation exists in patent law. There, while the cost of enforcement remains high, a solution has evolved that allows patent owners to more efficiently and effectively protect their property. The non-practicing entity (NPE) is an organization that does not seek to sell patented products, but rather specializes in licensing and enforcing patents.<sup>20</sup> Accordingly, they have dramatically changed the landscape of patent law, albeit with a great deal of controversy, by providing independent inventors with an additional source of capital, and with cheaper and more effective enforcement options.<sup>21</sup>

With only minor changes, the copyright world could adopt a similar model, whereby owners rely on third-parties to enforce their intellectual property rights. These copyright-based NPEs would fill a growing void by providing copyright owners with an effective and affordable mechanism for protecting their property, and in the process give owners the ability to realize more value from their property and more ways to protect it.

This Note proposes using NPEs in copyright law to solve the problem of mass online copyright infringement. Part I begins with an overview of copyright infringement both before and after the

Internet became the primary method of content distribution, and highlights the changes in business structure that have altered the copyright enforcement paradigm. It next discusses Righthaven's failed attempt to become a copyright NPE and the lessons that potential followers can learn from that company's experiment. Finally, the section ends with an analysis of the impact of NPEs on patent law, and notes that copyright law could benefit from the alternative enforcement mechanisms these organizations provide.

In Part II, this Note proposes introducing NPEs into the copyright world in order to achieve more affordable and effective copyright enforcement. This section explains that, unlike patent NPEs that own their intellectual property outright, a copyright NPE will be most effective by insuring the copyrights of others and using the doctrine of subrogation to enforce its client's rights against infringers. It then explains the basic mechanics of how such an organization would work, and then discusses the benefits that these organizations would give to society.

Part III addresses the potential criticisms of this proposal. Specifically, it explains how the fair use doctrine will not prevent copyright insurers from operating profitably. It also addresses concerns that copyright insurers will use their power to bully infringers into unfair settlements. Finally, it explains how copyright insurers will not adversely affect fair users or free speech.

## I. COPYRIGHT OWNERS NEED NEW ENFORCEMENT MECHANISMS

Over the past several decades, advances in technology have given copyright owners new and powerful ways to monetize their creations.<sup>22</sup> The Internet and, specifically, social networks allow owners to distribute their works to increasingly larger markets and to exercise greater control over how their property is used. However, the Internet also allows individuals to copy, redistribute, and pirate on a massive scale and in ways that the law cannot yet effectively control.<sup>23</sup> Accordingly, copyright owners cannot rely

16. 17 U.S.C. § 512(c)(1)(A)(iii) (2006).

17. *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop., of the H. Comm. on the Judiciary*, 109th Cong. 45–46 (2006) [*Copyright Claims Hearing*] (statement of the United States Copyright Office).

18. *Id.* at 45–47.

19. *Id.*

20. See *infra* section I.C.

21. Michael Risch, *Patent Troll Myths Exposed*, INTELL. ASSET MGMT. MAG., July/Aug. 2012, at 74.

22. *Promoting Investment and Protecting Commerce Online: The Art Act, The Net Act and Illegal Streaming: Hearing Before the Subcomm. on Intell. Prop., Competition, and the Internet H. Comm. on the Judiciary*, 112th Cong. 16 (Mar. 14, 2011) [hereinafter *Subcomm. Hearing*] (statement of Maria A. Pallante, Register of Copyrights).

23. *The "Stop Online Piracy Act": Hearing on H.R. 3261 Before the H. Comm. on the Judiciary*, 112th Cong. 1 (Nov. 16, 2011) (statement of Maria A. Pallante, Register of Copyrights).

on traditional copyright enforcement mechanisms.<sup>24</sup> Rather, they need new tools to protect their property against the new threats of the online world.

#### A. The Problem of Copyright Infringement

In recent Congressional testimony, Maria Pallante, the Register of Copyrights, articulated the problem of mass copyright infringement, saying:

[W]hen infringers blatantly distribute, stream, and otherwise disseminate copyrighted works on the Internet, they often do so because they have no expectation of enforcement. Unfortunately, the more these kinds of actions go unchecked, the less appealing the Internet will be for creators of and investors in legitimate content. In other words, Internet piracy not only usurps the copyright value chain for any one work, it also threatens the rule of copyright law in the 21st century.<sup>25</sup>

Unlike in the pre-Internet world, today anyone with a computer can create and distribute content, and anyone with a computer can infringe and pirate content. Because the Internet has so fundamentally altered the way individuals create, distribute, and consume content,<sup>26</sup> the law protecting that content must fundamentally change as well. As Ms. Pallante noted, without a change to provide adequate enforcement mechanisms, many creators will simply stop creating.<sup>27</sup>

#### 1. Traditional Copyright Enforcement Mechanisms

Before home recording technology became widely available in the 1990s, most content was created, produced, and distributed by large organizations. For example, to professionally produce a music album, a record company must pay for recording, editing, marketing, and distributing.<sup>28</sup>

Because trained professionals perform these functions, and because the final product shipped to market is a tangible good, the costs are incredibly high.<sup>29</sup> Accordingly, large-scale content production was an enterprise in which only large organizations could operate.

Further, the enforcement system envisioned by copyright law was appropriate for such organizations. Because the law allows a copyright owner to sue when her work is infringed, simple business sense dictates that the work in question must be at least as valuable as the cost of the litigation to protect it,<sup>30</sup> or that the owner must have a sufficiently good chance of winning the suit and recouping his costs.<sup>31</sup> Further, the high cost of bringing creative works to market would require the work to be at least as valuable as the cost of creating and distributing it.<sup>32</sup> Combined with the fact that these works were commercialized by large organizations, the ability to use the court system to protect a copyright was an appropriate enforcement mechanism. Large organizations were willing to incur the expense of protecting their works through litigation because they only invested in a product that was worth at least the cost of commercialization and defense.

While traditional litigation was an adequate remedy for large organizations, the fair use doctrine<sup>33</sup> provided a mechanism for individuals and smaller entities to use copyrighted material without fear of legal retribution by the larger and more powerful organizations. Under traditional enforcement models, this doctrine worked well because it helped normalize the unequal power relationship between large and small entities. Further, the doctrine tacitly recognized that, because of the massive differences between the large organization and individual copier, the individual's copying was unlikely to cause harm to the organization's product. Indeed, when content

---

29. *Id.* at 3, 6.

30. No rational person would spend \$30,000 to protect a copyright only worth \$20,000.

31. 17 U.S.C. § 505 (2006).

32. A business would not sell a product for ten dollars if it cost them fifteen dollars to produce it.

33. The fair use doctrine allows unauthorized use of copyrighted materials under certain conditions. 17 U.S.C. § 107 (2006) (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”).

---

24. *Id.*

25. *Id.* at 2.

26. *Subcomm. Hearing, supra* note 22, at 16.

27. *Id.* at 2.

28. RECORD INDUSTRY ASSOCIATION OF AMERICA, *LET'S PLAY: THE AMERICAN MUSIC BUSINESS* 6 (2010).



production was a capital-intensive industry, logic dictated that only a well-funded entity could cause significant damage through infringement.

## 2. The Internet and Mass Copyright Infringement

While copyright enforcement mechanisms were effective in the world of the 1976 Copyright Act, the Internet has fundamentally altered the business of content production.<sup>34</sup> Unlike the example in the previous section, producing and distributing a music album today requires only a microphone, basic recording software, and an Internet connection. The world of content production is no longer capital-intensive and dominated by large entities.<sup>35</sup> Rather, organizations such as the New York Times and NBC operate on a distribution model similar to that of the average blogger: they post content to their websites and rely on advertising revenue to make a profit.<sup>36</sup> Accordingly, content is cheaper to produce and cheaper to infringe. The result is that more individuals are producing and distributing their own content, but do not have effective or affordable tools to fight infringement.<sup>37</sup>

While online content distribution is extremely cheap, protecting that content is impossibly expensive.<sup>38</sup> First, copyright owners bear the burden of policing their own work.<sup>39</sup> When they find unauthorized copying online, they must ask the website administrator to remove the offending material, and the owner can only sue for infringement if the work is not removed “expeditiously.”<sup>40</sup> When the work is widely copied, this process can become incredibly time-consuming and lead to high opportunity costs. In the words of Matthew Inman, “trying to police copyright infringement on the Internet is like strolling into the Vietnamese jungle circa 1964 and politely asking

everyone to use squirt guns.”<sup>41</sup> Second, most content creators today do not have the resources to protect their property through litigation.<sup>42</sup> Even if they did, few copyright owners would be willing to spend thousands of dollars in court costs and attorney’s fees to recover only a fraction of their costs in a damage award. The result is that many copyright owners have been “left . . . to compete with thieves.”<sup>43</sup>

Indeed, most infringers know that they are unlikely to face the consequences of their actions because enforcement is too expensive. Because there is rarely a credible threat of litigation, and because infringing costs even less than creating, they are able to make a profit at the expense of content producers.<sup>44</sup> For example, infringers use unauthorized works to generate ad revenue on their sites.<sup>45</sup> They simultaneously divert traffic from the work’s original source, which decreases the owner’s ad revenue.<sup>46</sup> Accordingly, a content producer may invest substantial energy in distributing his work online, only to be left remediless against the destructive effects of a few mouse-clicks. The infringer contributes nothing new to society and prospers at the producer’s expense, who, because of mass copyright infringement, has increasingly fewer incentives to invest resources into creating new works.

## B. Copyright Enforcement and Righthaven

Recognizing the problem of mass online copyright infringement, a company called Righthaven began a doomed attempt at third-party copyright enforcement in 2010.<sup>47</sup> It was built on a simple model: acquire limited rights to copyrighted material and then aggressively pursue infringers.<sup>48</sup> While its experiment ultimately ended in failure, the lessons learned were not in vain. Despite some legal technicalities that ultimately proved to be fatal, Righthaven demonstrated that a third-party copyright enforcement entity has the potential to be effective, profitable, and beneficial to its clients.

---

34. *Subcomm. Hearing*, *supra* note 22, at 16.

35. Justin Bachman, *The Big Record Labels’ Not-So-Big Future*, *BUS. WK.* (Oct. 11, 2007), <http://www.businessweek.com/stories/2007-10-10/the-big-record-labels-not-so-big-futurebusinessweek-business-news-stock-market-and-financial-advice>.

36. Eriq Gardner, *The Righthaven Experiment: A Journalist Wonders if the Copyright Troll Who Sued Him was Somehow . . . Right?*, *A.B.A. J.*, May 2012, at 36.

37. *See* AM. INTELL. PROP. LAW ASS’N, *REPORT OF THE ECONOMIC SURVEY 2011*, at 35 (stating the median cost of copyright litigation for disputes with less than \$1,000,000 at risk was \$200,000 in 2011).

38. *Id.*

39. 17 U.S.C. § 512(c)(1)(A)(iii) (2006).

40. *Id.*

---

41. Inman, *supra* note 5.

42. *See Copyright Claims Hearing*, *supra* note 17.

43. *Subcomm. Hearing*, *supra* note 22, at 1.

44. *Id.*

45. *Id.*

46. *Id.*

47. Steve Green, *Legal attack dog sicked on websites accused of violating R-J copyrights*, *LAS VEGAS SUN* (Aug. 4, 2010, 2:00 AM), <http://www.lasvegassun.com/news/2010/aug/04/unlikely-targets-emerging-war-media-content/>.

48. *Id.*

## 1. Righthaven's Business Model

Righthaven sought to provide copyright enforcement services to content producers, specifically newspaper publishers.<sup>49</sup> It entered into agreements with several media companies in which it acquired limited rights to their copyright portfolios in return for a share in the proceeds of any litigation it won based on those copyrights.<sup>50</sup> These agreements gave Righthaven “all copyrights requisite to have Righthaven recognized as the copyright owner of the work for purposes of Righthaven being able to claim ownership,”<sup>51</sup> and limited Righthaven's ability to exploit the copyrights to merely suing for infringement.<sup>52</sup> Further, Righthaven was obligated to reassign its interest in the copyrights to their owners if it did not pursue litigation within a specified time period.<sup>53</sup>

Once Righthaven acquired these rights, it identified infringers, who were always individuals or small organizations, and demanded them to pay a settlement fee or face litigation.<sup>54</sup> It used aggressive tactics and the threat of costly litigation to induce most to quickly negotiate and pay the settlement fee.<sup>55</sup> When an infringer refused to negotiate a payment and opted to defend its activity in court, Righthaven asked for the defendant's domain name to be forfeited as part of the judgment.<sup>56</sup> In short, Righthaven's strategy was to use its legal muscle to quickly and cheaply secure settlement payments from parties that lacked resources to defend themselves, and to spend time and money in court only when absolutely necessary.

## 2. Why Righthaven Failed

Despite its aggressive tactics, Righthaven went defunct less than two years after it was founded.<sup>57</sup> Because many of the people it sued were sympathetic

defendants and protected by the fair use doctrine,<sup>58</sup> and because the courts determined that it did not have standing to sue for copyright infringement, Righthaven lost every case it litigated.<sup>59</sup> Accordingly, the company's assets were turned over to a court-appointed receiver, and its founder is now under investigation by the Nevada State Bar.<sup>60</sup>

First, Righthaven's business model was flawed because it only sought to enforce copyrights against infringers who were likely to give in to settlement demands.<sup>61</sup> Because individuals and small organizations typically do not have the resources or desire to fight lengthy court battles, Righthaven was able to use the specter of litigation to strong-arm these parties into modest settlement agreements.<sup>62</sup> However, while this strategy may have looked good on paper; it backfired in practice. While most infringers quickly settled, some did not. In those cases that were heard in court, judges ruled in favor of the defendants.<sup>63</sup> Furthermore, as some defendants increasingly won cases against Righthaven, others became less likely to settle infringement claims, and more likely to litigate. Consequently, Righthaven spent more money in court than it was prepared to and acquired a reputation as a copyright “troll” out to make easy money at the expense of defenseless individuals, both in and out of court. Accordingly, courts grew less sympathetic to Righthaven's complaints and more favorable towards the defendants.

Second, Righthaven's business model was flawed because it failed to identify which infringers were protected by the fair use doctrine and which were not. In many of these cases, the court found that although the defendants had engaged in unlawful copying, their use of the material was a fair use and therefore not an infringement.<sup>64</sup> For example, in

---

49. Gardner, *supra* note 36, at 37.

50. Righthaven, LLC v. Hoehn, 792 F. Supp. 2d 1138, 1142 (D. Nev. 2011).

51. *Id.* at 1143.

52. *Id.* at 1142.

53. *Id.* at 1145.

54. Green, *supra* note 47.

55. Steve Green, *About Righthaven*, VEGAS INC (Nov. 29, 2010, 12:00 AM), <http://www.vegasinc.com/news/2010/nov/29/about-righthaven>.

56. Steve Green, *Judge Strikes Righthaven Website Domain Demand*, VEGAS INC (Apr. 16, 2011, 2:05 AM), <http://www.vegasinc.com/news/2011/apr/16/judge-strikes-righthaven-website-domain-demand>.

57. Steve Green, *Righthaven Receiver Moves to Fire CEO Steven Gibson*, LAW VEGAS SUN (June 25, 2012, 5:22 PM), <http://www.vegasinc.com/news/2012/jun/25/righthaven-receiver-moves-fire-ceo-steven-gibson>.

---

58. *Id.*

59. See generally *Comprehensive List of Copyright Infringement Lawsuits Filed by Righthaven, LLC*, RIGHTHAVEN LAWSUITS (last visited Apr. 20, 2013), <http://righthavenlawsuits.com/lawsuits.html> (listing of every Righthaven lawsuit and its disposition).

60. Steve Green, *Three Attorneys Face Righthaven Inquiry by State Bar*, VEGAS INC (Jan. 12, 2012, 7:52 PM), <http://www.vegasinc.com/news/2012/jan/12/three-attorneys-face-righthaven-inquiry-state-bar>.

61. Green, *supra* note 47.

62. *Id.*

63. Steve Green, *Righthaven Ordered to Pay Attorney's Fees in Another Case*, VEGAS INC (June 14, 2012, 7:15 PM), <http://www.vegasinc.com/news/2012/jun/14/righthaven-ordered-pay-attorneys-fees-another-case>.

64. See Righthaven LLC v. Realty One Group, No. 2:10-CV-1036 (D. Nev. Oct. 19, 2010); Righthaven LLC v. Klerks, No. 2:10-CV-00741 (D. Nev. Sept. 17, 2010).

*Righthaven, LLC v. Hoehn*,<sup>65</sup> the court found that although the defendant had copied and re-posted an entire copyrighted newspaper article, his use was a fair use.<sup>66</sup> Righthaven lost money in litigation and in settlement potential because it was unable to determine which infringers were fair users.<sup>67</sup> Furthermore, because Righthaven sued many fair use defendants, its image suffered even more, and in addition to pursuing ill-equipped defendants, it also harassed individuals for their legitimate use of copyrighted material.<sup>68</sup>

Third, and finally, the most serious flaw with Righthaven's business model was that the company never acquired standing to sue for copyright infringement.<sup>69</sup> Federal statute dictates that the legal or beneficial owner of one of the six exclusive rights under a copyright the right to sue for infringement. As interpreted by the courts, this provision requires a plaintiff to own one of the exclusive rights enumerated in the Copyright Act.<sup>70</sup> For example, in *Silvers v. Sony Pictures Entertainment, Inc.*,<sup>71</sup> the court found that the plaintiff did not have standing to sue for copyright infringement because she had only acquired the bare right to sue for infringement.<sup>72</sup>

When Righthaven acquired an interest in Stephens Media's copyright portfolio, it gained "all copyrights requisite to have Righthaven recognized as the copyright owner of the Work for purposes of Righthaven being able to claim ownership as well as the right to seek redress for past, present and future

infringements of the copyright, both accrued and unaccrued, in and to the Work."<sup>73</sup> The court found that this agreement did not give Righthaven ownership over any of the exclusive rights under a copyright, and Righthaven therefore did not have standing to bring the suit.<sup>74</sup> Accordingly, all of the 276 cases Righthaven brought were dismissed, and Righthaven was often ordered to pay the defendant's litigation costs.<sup>75</sup>

Furthermore, after Righthaven accrued over \$300,000.00 in attorney's fees owed to its opponents,<sup>76</sup> a federal judge ordered all of the company's tangible and intangible assets delivered to a court-appointed receiver, which was sold to satisfy its debts.<sup>77</sup> Although the company still has two cases pending in the Ninth Circuit Court of Appeals, it is essentially defunct.<sup>78</sup> Righthaven's attempt to provide an alternate copyright enforcement mechanism was a colossal failure. However, this failure is a valuable lesson for future attempts at alternative enforcement: a third-party copyright enforcer must overcome the hurdles of fair use and standing in order to be effective and profitable.

### C. Lessons in Third-Party Enforcement from Patent Law

In patent law, organizations known as NPEs operate on a business model similar to Righthaven's. However, unlike Righthaven, NPEs have been enormously successful and have had a profound effect on the landscape of patent law.<sup>79</sup> In addition to acquiring rights to patents and then suing infringers, they seek to build revenue streams by licensing their patents to others.<sup>80</sup> Accordingly, NPEs in patent law have provided an effective and affordable solution to the problem of expensive litigation. Due to the many similarities between patent law and copyright law, it seems appropriate to look to these entities for answers to the problem of inaccessible copyright enforcement.

65. 792 F. Supp. 2d 1138 (D. Nev. 2011).

66. *Id.* at 1150.

67. Green, *supra* note 63.

68. Nate Anderson, *Class-action lawsuit targets Righthaven's "extortion litigation"*, ARS TECHNICA (May 18, 2011, 12:57 PM), <http://arstechnica.com/tech-policy/2011/05/class-action-lawsuit-targets-righthavens-extortion-litigation>.

69. *Righthaven, LLC v. Democratic Underground*, 791 F. Supp. 2d 968, 976 (D. Nev. 2011).

70. 17 U.S.C. § 106 (2006) ("[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.").

71. *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881 (9th Cir. 2005).

72. *Id.*

73. *Righthaven LLC v. Hoehn*, 792 F. Supp. 2d at 1146 (D. Nev. 2011).

74. *Id.*

75. *See Righthaven LLC v. Wolf*, 813 F. Supp. 2d 1265, 1273 (D. Nev. 2011); *Righthaven LLC v. Eiser*, No. 2:10-CV-3075, (D.S.C. Jan. 13, 2012).

76. Green, *supra* note 63.

77. Steve Green, *Judge Strips Righthaven of Rights to 278 Copyrights and its Trademark*, VEGAS INC (Mar. 5, 2012, 7:29 PM), <http://www.vegasinc.com/news/2012/mar/05/judge-strips-righthaven-rights-278-copyrights-and-/>.

78. *Id.*

79. *Id.*

80. Joff Wild, *A War by Any Other Name*, INTELL. ASSET MGMT., Nov./Dec. 2009, at 4.



## 1. The Structure of a Non-Practicing Entity in Patent Law

Large NPEs operate on one of two models. Organizations such as Acacia Technologies work by acquiring patents, licensing the use rights to those patents, and suing infringers.<sup>81</sup> Conversely, organizations such as RPX Corporation are known as defensive patent aggregators (DPAs).<sup>82</sup> These NPEs work by building patent portfolios and licensing them for defensive use, essentially providing risk management services via a pool of patents that its clients may use to defend themselves from litigation.<sup>83</sup>

Under the first model, NPEs provide a clearing-house function: they identify valuable patents, acquire them, and then assert them through licensing negotiations or litigation. Companies use these types of NPEs as a cheap alternative to in-house research and development: the NPE has already located and acquired the needed technology and is usually able to provide it for less than the cost of research and development. Once a license is agreed upon, the company is able to start producing its product immediately. This arrangement is similar to a common cross-licensing deal,<sup>84</sup> except that it is one-sided, which makes the whole process more efficient.

Under the second model, NPEs provide risk management services in the form of patent protection. Here, an NPE aggregates a large pool of patents that its clients can use to defend against infringement suits. Although some commentators, and even some DPAs, claim that this business model provides strategic defense against “trolling” behavior, Jiaqing Lu points out that both models are necessary in today’s patent ecosystem.<sup>85</sup> Under his theory, both varieties of NPEs

complement each other by providing unique services to the market.

## 2. The Judicial Response to Non-practicing Entities

Although U.S. courts have yet to address whether patent law should treat NPEs differently than other patent users, several courts have heard infringement cases in which NPEs have been principle players. For example, in *eBay v. MercExchange, LLC*,<sup>86</sup> the Supreme Court considered whether an injunction should automatically issue against a party liable of patent infringement.<sup>87</sup> Writing for the Court, Justice Thomas rejected the appellate court’s view that a party’s “lack of commercial activity in practicing the patents” would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue.<sup>88</sup> He noted instead that “some patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves.”<sup>89</sup> However, Justice Kennedy, in a concurring opinion, argued that a court should consider “the economic function of the patent holder.” Justice Kennedy noted that for NPEs, “an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.”<sup>90</sup>

Further, in *z4 Technologies v. Microsoft*,<sup>91</sup> the district court for the Eastern District of Texas denied z4’s request to enjoin Microsoft’s infringing use of its software patent.<sup>92</sup> In this case, z4 argued that it had made a significant effort to commercialize its patents, and that Microsoft’s continuing infringement would limit its ability to sell its product.<sup>93</sup> Because Microsoft and z4 were not direct competitors, the court found that z4 would not be irreparably harmed by the infringement, and that monetary damages were an

---

81. *Profile*, ACACIA, [http://acaciatechnologies.com/aboutus\\_main.htm](http://acaciatechnologies.com/aboutus_main.htm) (last visited Apr. 20, 2013) (“Acacia Research Corporation’s subsidiaries partner with inventors and patent owners, license the patents to corporate users, and share the revenue. Our partners are primarily individual inventors and small companies with limited resources to deal with unauthorized users but include some large companies wanting to generate revenues from their patented technologies.”).

82. RPX, <http://www.rpxcorp.com> (last visited Apr. 20, 2013) (“Every member of our client network receives a license to every patent and patent right we own.”).

83. *Id.* (“RPX helps corporations manage their exposure to patent risk by providing a rational alternative to traditional litigation strategy. Our solution offers a market-based solution in which we proactively acquire high-risk patents *before* they can become a costly legal problem for our clients.”).

84. BLACK’S LAW DICTIONARY 1003 (9th ed. 2009) (“An agreement between two or more patentees to exchange licenses for their mutual benefit and use of the licensed product.”).

85. Jiaqing Lu, *The Economics and Controversies of Nonpracticing Entities (NPEs): How NPEs and Defensive Patent*

---

*Aggregators will Change the License Market, Part II*, 48 LES NOUVELLES 147, 151 (2012).

86. 547 U.S. 388 (2006).

87. *Id.*

88. *Id.* at 393 (quoting *MercExchange, L.L.C., v. eBay, Inc.*, 275 F. Supp. 2d 695, 712 (E.D. Va. 2003)).

89. *Id.*

90. *Id.* at 396 (Kennedy, J., concurring).

91. 434 F. Supp. 2d 437 (E.D. Tex. 2006).

92. *Id.* at 438.

93. *Id.* at 440.

adequate award.<sup>94</sup> Essentially, it said that Microsoft's use would not dissuade others from purchasing z4's software because it only used the software in its own products. However, the court overlooked the harm that Microsoft's continuing use would inflict on z4's ability to license its software.

For NPEs, the implications of this decision are dire: if a judge can deny an injunction in part because the parties are not competitors, NPEs will always operate at a disadvantage. Because infringers will be less likely to be enjoined when sued by an NPE rather than by a direct competitor, they will be more likely to litigate claims brought by NPEs, and NPEs will accordingly have to accept lower licensing fees. Although the law has yet to speak directly to the issues presented by NPEs, it seems far from reaching a consensus.

### 3. The Impact of Non-Practicing Entities in Patent Law

As seen in *eBay v. MercExchange*, NPEs have both friends and enemies.<sup>95</sup> Supporters argue that NPEs benefit the patent system by lowering transaction costs, which makes the patent market more efficient,<sup>96</sup> giving individual inventors a more efficient way to enforce their rights,<sup>97</sup> and providing an additional source of capital to individual inventors and startup companies.<sup>98</sup> However, their opponents argue that NPEs are ruining the patent system because they use low-value patents to extort large licensing fees from productive companies,<sup>99</sup> try to maximize their profits by waiting for an industry to develop before asserting their patents,<sup>100</sup> and freeload off of the patent system without contributing anything in return.<sup>101</sup>

However, a recent empirical study by Michael Risch shows that most of these arguments have no factual support. In fact, his data revealed that NPEs have had a significant impact on patent law in only two ways: they help individual inventors enforce claims

against large entities, and provide additional sources of capital to individual inventors trying to license their patents.<sup>102</sup> Risch found that 29% of patents enforced by NPEs were acquired from individual inventors,<sup>103</sup> and that they enforced twice as many individual inventor patents as a random sampling of other litigated patents.<sup>104</sup> Furthermore, he found that because NPEs are able to pursue high-stakes patent litigation,<sup>105</sup> and because they have greater bargaining power with which to negotiate settlement deals,<sup>106</sup> they are often the individual inventor's only viable option for protecting his rights.

Risch's study shows that, while NPEs are active and visible, they operate under the same parameters as productive entities. Rather than being freeloaders, rent-seekers, or trolls, they have most noticeably impacted patent law by providing effective and affordable enforcement mechanisms to individual inventors. Accordingly, NPEs have shown that third-party enforcement is a viable solution to the problem of high litigation and enforcement costs.

### 4. What can Copyright Law Learn from Patent NPEs?

NPEs in patent law have most dramatically benefitted individual inventors via enhanced enforcement and licensing opportunities.<sup>107</sup> In addition, they provide defense, risk management, and research and development services to larger clients.<sup>108</sup> Of these services, copyright owners could benefit most from better enforcement and risk management, and a third-party copyright enforcer, or copyright NPE, should look to patent NPEs for guidance in these areas.

Patent NPEs are able to help individual inventors protect their works because they are better situated to use the legal system to enforce their rights.<sup>109</sup> Accordingly, a copyright NPE must be able to prosecute claims of infringement against even the most sophisticated infringers, and must have sufficient bargaining power to negotiate settlement agreements with large infringers. Ultimately, the copyright NPE must have a revenue stream that enables it to

---

94. *Id.* at 444.

95. See Damian Myers, *Reeling in the Patent Troll: Was eBay v. MercExchange Enough?*, 14 J. INTELL. PROP. L. 333 (2007); Sannu Shrestha, *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities*, 110 COLUM. L. REV. 114 (2010).

96. James McDonough, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L. J. 189, 211 (2006).

97. Risch, *supra* note 21, at 74.

98. Shrestha, *supra* note 95, at 150.

99. Myers, *supra* note 95, at 354.

100. Mark Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEXAS L. REV. 1991, 1995 (2007).

101. Wild, *supra* note 80, at 4.

---

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Risch, *supra* note 21

108. See discussion *supra* notes 80–81.

109. Risch, *supra* note 21, at 74. ("NPE litigation may be the best way for garage inventors to capitalize on their patents if infringers refuse to license.").

aggressively assert its rights.

Furthermore, patent users also benefit from the risk management services provided by defensive patent aggregators. With a large pool of patents available for licensing, the NPE has a reliable revenue source, and its clients essentially have insurance against the risk of being sued for infringement. A copyright NPE should adopt this model with some slight modifications. It could aggregate a large pool of copyrights, and use the fees generated by its clients to pursue infringers, rather than to defend against claims of infringement.

NPEs have been successful in patent law, and a copyright NPE should seek to emulate their successes. When looking to patent NPEs for solutions to the problem of high enforcement costs in copyright law, a would-be copyright NPE will find that the benefits of third-party enforcement accrue primarily to individual actors and small entities, and should target its efforts accordingly. Just as there are a variety of NPEs in patent law, the fact that there are also a variety of content creators in copyright law indicates that a similar variety of NPEs should exist here as well.

## II. COPYRIGHT LAW SHOULD ENCOURAGE THE DEVELOPMENT OF NPEs

Copyright law will benefit from NPEs in many ways that patent law has benefited from NPEs. Just as patent NPEs provide additional sources of capital to independent inventors and add credibility to any claims of infringement,<sup>110</sup> copyright NPEs will also benefit content producers in similar ways. Furthermore, as there are different business models for patent NPEs, so too will there be multiple business models for copyright NPEs.

Depending on its clientele, a copyright NPE may not be able to effectively operate by owning copyrights outright. Where producers such as musicians and dancers operate by both creating and performing their works, such a system would take too much control from them and greatly decrease their ability to profit from their property. Here, the most efficient method of third-party copyright enforcement will be through a copyright insurance system. Under this system, content producers will be able to insure their works against infringement, and insurance providers will be able to pursue infringers in the

court system via the doctrine of subrogation. Content producers will always receive compensation for harm caused by infringers, and insurance providers will, in addition to collecting premiums for their services, be able to use the legal system to pursue infringers.

### A. Copyright Insurance is the Best Third-Party Enforcement Mechanism

Patent NPEs benefit society primarily by providing an additional source of capital to independent inventors, and by providing them with enforcement services against larger entities that often infringe with impunity.<sup>111</sup> In copyright law, an NPE would provide these same services, although by different mechanisms. By providing insurance for copyright infringement, a copyright NPE would be able to pursue infringers, while insuring that individual copyright owners are compensated for their harm.

#### 1. Copyright Insurance for Content Creators

A copyright insurance regime is the most effective mechanism for a copyright NPE to operate under because it will provide the NPE a steady income flow while simultaneously giving the owner more effective and affordable enforcement options. This insurance would work like most other insurance plans; a policyholder will pay a premium to insure her property against harm. Like other forms of insurance, the insured will determine the value<sup>112</sup> of her property, and insure it for a sum that does not exceed that amount. When the insured object is damaged, the policyholder files a claim with the insurance company, who then compensates her for her loss. In a copyright insurance policy, the content producer will primarily insure against infringement,<sup>113</sup> and will accordingly file a claim whenever its work is infringed. It is important to note, though, that under this system, the insured, not the insurer, bears the responsibility of discovering and reporting infringing uses.<sup>114</sup>

Also, the content producer will always be compensated for the harm caused by the infringement,

---

111. *See id.*

112. A simple Google search for “copyright valuation” yields a list of several firms that specialize in this service.

113. However, the policy could also be extended to cover theft, abandonment, etc.

114. The burden of discovering infringing works is not significant. A Google search for one’s copyrighted property will often yield many infringing uses. Also, content creators will normally have networks of colleagues and fans that will notify them of unauthorized uses.

---

110. *Id.*

up to the amount it has insured against. For example, if the work was insured for ten-thousand dollars, the insurance company will pay up to ten-thousand dollars for any infringement of that work. Accordingly, an infringement of that work worth five-thousand dollars will yield five-thousand dollar payment from the insurer. Conversely, if the infringement caused harm in excess of ten-thousand dollars, the owner would be entitled to pursue the infringer for the remainder of the damage.

Copyright insurance offers security from infringers while leaving the owner's copyright intact, and completely within her control. While the insurance policy allows the owner to be compensated for her harm without self-help or the legal system, it does not destroy her ability to use these mechanisms to enforce her rights. Although the insurance policy will often be the cheapest and most effective method for the owner to receive compensation, it does not obligate her to forego her other rights.

## 2. Copyright Insurance for Insurance Providers

A copyright insurance provider will operate by collecting premiums from its policyholders, paying claims for infringement damages, and then suing infringers. The insurance provider will have standing to sue for infringement because once it compensates a policyholder for its injuries, it will acquire the legal right to sue the offending party through the doctrine of subrogation.<sup>115</sup> As a legally sophisticated entity, the insurance provider will be able to use its resources and expertise to add credibility to its enforcement efforts in a way that a private individual could not, and in a way that will deter potential infringers from their illegal activities. Further, by collecting premiums from policyholders, the provider will insure that it has ample resources with which to pursue infringers, and sufficient funds to compensate instances of infringement.

First, when a policyholder's insured property is infringed, the insurance provider will evaluate

the cost of the infringement, and then compensate the policyholder according to the terms of the policy. However, before a copyright is insured, it will be appraised, just like any other piece of insured property. This will insure that the amount paid by the provider will reflect the actual damage caused by the infringement, including damage to value, actual and potential sales, reputation, and potential licensing deals.

Second, once the insurance provider has fully compensated the policy owner, it will be free to sue the infringer to recover the amount it paid to its insured. Because insurance providers typically have greater bargaining power than individuals, and because the insurance provider, and not the content producer, will bring suit, the infringer will have greater incentive to settle the case. Just as NPEs in patent law provide bargaining power and capital to independent inventors, copyright insurance providers will lend similar credibility to their clients.

Furthermore, not every instance of infringement will result in a lawsuit. Often, online copyright infringement is not worth the cost of a lawsuit,<sup>116</sup> and would be dealt with outside of court. However, because an infringer would receive a "cease and desist" letter from an organization rather than an individual, it would have greater incentive to stop its infringing behavior. From the provider's point of view, a takedown notice, even without a settlement, will be a valuable tool because it will prevent future infringing uses, which will in turn lower the number of future claims it must pay.

Ultimately, the insurance provider, with the very credible threat of litigation it presents to infringers, will be able to control infringement more efficiently than an individual could. Based on the value of the copyright and the amount of damage caused by the infringement, the insurance provider would be able to determine whether to use litigation, negotiation, or a simple takedown request.

## B. Copyright Insurance is the Best Solution to Online Infringement, and the Most Effective Model for an NPE in Copyright Law

Copyright insurance will solve the problem of expensive and inaccessible copyright enforcement

---

115. *In re Hamada*, 291 F.3d 645, 649 (9th Cir. 2002) ("In general terms, subrogation is the substitution of one party in place of another with reference to a lawful claim, demand or right. It is a derivative right, acquired by satisfaction of the loss or claim that a third party has against another. Subrogation places the party paying the loss or claim (the "subrogee") in the shoes of the person who suffered the loss ("the subrogor"). Thus, when the doctrine of subrogation applies, the subrogee succeeds to the legal rights and claims of the subrogor with respect to the loss or claim."); see also *Mutual Servs. Cas. Ins. Co. v. Elizabeth State Bank*, 265 F.3d 601, 629 (7th Cir. 2001).

---

116. See, e.g., Danny Bradbury, *The Oatmeal beat FunnyJunk, but other cartoonists aren't so lucky*, GUARDIAN (June 21, 2012, 1:55 AM), <http://www.guardian.co.uk/technology/2012/jun/21/oatmeal-carreer-comics-property> (noting that the highest paid online cartoonists make about \$108 per day. Additionally, litigation can cost as much as two to three-thousand dollars per day.).



mechanisms by allowing infringement claims to be prosecuted by organizations with the means to do so, and by giving producers an immediate and adequate remedy. It offers an alternative to the status quo, which is more efficient, more equitable, and more consistent with other areas of the law.

#### 1. Copyright Insurance is More Efficient than Traditional Enforcement

First, a copyright insurance program will incentivize the creation of new works by offering producers more ways to realize value from their property. By guaranteeing payment for legitimate injuries, and by allowing sophisticated parties to prosecute claims of copyright infringement on behalf of their clients, copyright insurance will reduce the risk that harm caused by infringement will go uncompensated. This means that producers will realize more value from their creations, and will in turn be motivated to produce more works.

Furthermore, producers will spend less time trying to protect their works, and more time creating new works. Just as NPEs in patent law allow inventors to continue to invent by taking care of the legal issues associated with the patent, so too will copyright insurance give producers more resources with which to create new works. By allowing the producer to receive immediate compensation for her harm while the insurance provider addresses the legal issues involved in the infringement, the producer has more resources with which to create new works.

Second, insurance companies will reduce instances of infringement because they, unlike their clients, have a bargaining position from which they can negotiate settlements. Because most copyright infringements are not worth the cost of a trial,<sup>117</sup> and because most individuals cannot afford the cost of litigation,<sup>118</sup> private efforts to halt infringement are often fruitless. However, when a sophisticated organization with the ability to pursue litigation attempts to settle an infringement dispute outside of court, the infringer will more likely stop his illegal activity than when a private individual sends the same letter.

Furthermore, because of their greater leverage and bargaining power, insurance providers will be able to stop infringement before litigation or even negotiations become necessary, which will ultimately lower the cost of enforcement. Because action taken by

an insurance provider will more likely stop offending activity, it is less likely that the dispute will grow to a size that will require litigation. Accordingly, every party involved in the dispute, including the court and the taxpayers, will benefit from more efficiently settled conflicts.

Third, copyright insurance will lower transaction costs in copyright enforcement by increasing certainty and stability in enforcement mechanisms. Because content producers will know that they will be compensated for harm caused by infringement, they will work less to protect their property. Rather, the insurance provider, to recover the value of its payments, will seek compensation from the infringer. This is a more efficient system because, as between the insurer and the insured, the insurer is in the best position to, and can most cheaply seek redress for the harm. The insurer, because its business will be enforcing copyrights, will be able to navigate all aspects of the dispute resolution process more efficiently and cheaply than could a private individual.

Finally, insurance providers will be better able to determine which instances of infringement will be worth litigating than private individuals. Just like NPEs in patent law, insurance providers will decide to pursue claims based primarily on the likelihood of success, and will accordingly litigate only meritorious claims.<sup>119</sup> In contrast, when individuals file suit, their decisions are often colored by emotion,<sup>120</sup> and the perceived inequities of the situation.<sup>121</sup> The result is a court system burdened by frivolous claims. However, by preventing meritless and low value claims from being litigated, insurance providers will decrease the burden on the courts, and lower the average cost of litigation across the entire legal landscape.

#### 2. Copyright Insurance is Consistent with Related Areas of Law, and an Appropriate Remedy for Mass Copyright Infringement

Copyright infringement is an unfortunate reality of the online world. While no one denies that such infringement is illegal, the fact remains that no one has been able to find an effective solution to the problem.<sup>122</sup> However, by encouraging the development

---

119. See Risch, *supra* note 21, at 74.

120. Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 HARV. C.L.-C.L.L. REV. 573 (2011).

121. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1135–36 (2000).

122. Subcomm. Hearing, *supra* note 22, at 1.

---

117. *Id.*

118. *Id.*



of copyright insurance, the copyright system would more accurately reflect the realities of the online world. Furthermore, by having infringement claims litigated by third parties, copyright practice would be more consistent with tort law practice and with the other subsets of intellectual property law.

First, the copyright system is notorious for its inability to evolve at the same speed as technology, and it must constantly be tweaked to prevent it from becoming entirely obsolete.<sup>123</sup> By developing a copyright insurance system, the law would tacitly recognize that many content producers cannot afford to defend their property and that the Internet presents challenges to copyright law that are too big to be confronted by individuals. Just as traditional tort law accepted that many parties who had legitimate grievances could not afford to seek redress through the courts, copyright law must recognize that many copyright owners cannot afford to use the courts to satisfy their claims. By creating a copyright insurance system, many owners would receive compensation they otherwise would not, and the law would be better able to protect content producers' intellectual property.

Second, copyright insurance would increase the cohesion between copyright law and tort law, while maintaining its conformity to the other subsets of intellectual property law. By allowing insurance providers to prosecute infringement for their clients, injured parties will not have to rely on their own, often limited, resources to get compensation for their injuries. Accordingly, copyright law, just like tort law, will recognize that because insurance companies depend on litigation for a large part of their business, and because it is more difficult for individuals to be productive when they are involved in litigation, it is more efficient for insurance companies, rather than individuals, to litigate claims.

Also, copyright insurance will require copyright owners to maintain and defend their property to some extent. Because copyright owners will have to file a claim to be compensated for infringement, they will have to remain diligent in locating unauthorized uses of their property. In patent<sup>124</sup> and trademark<sup>125</sup> law—and even in traditional property law<sup>126</sup>—owners are also required to maintain their ownership interest in

their property. This is because the law seeks to reward productivity and industry, and to hold otherwise would result in waste, as owners would receive the benefit of legal protection with no duty in return. In a copyright insurance system, this requirement will prevent unused and unwanted intellectual property from being enforced for illegitimate gain, as logic dictates that few resources will be used to defend something of little value.

### 3. Copyright Insurance is More Equitable than the Current Enforcement Mechanisms

Copyright insurance will allow content producers to receive compensation for any instance of infringement, and will also preserve their ability to determine when and how they will enforce their rights. Under the current system, copyright owners are rarely able to obtain a remedy for their injuries, or even to enforce their rights at all.<sup>127</sup> However, because copyright insurance will always compensate an owner for his injury, more owners will recover for their harms, and, necessarily, more infringers will pay for the harm they cause. The result is a more equitable copyright system where more injuries are compensated, and more defendants are held accountable for their actions.

Furthermore, by requiring a copyright owner to file a claim in order to receive compensation, the owner retains complete control over which infringements will be prosecuted. Because a copyright owner may not want to sue every infringer, such as people with disabilities, charitable organizations, or educational institutions, this requirement provides indirect protection to such parties, and allows the owner greater control of how others use his work. In the Righthaven saga, for example, the media organizations that sold their rights suffered damage to their reputations when Righthaven's aggressive tactics drew the attention of bloggers and news organizations.<sup>128</sup> Here, though, a copyright owner could avoid such negative associations by allowing certain instances of infringement, or by seeking to resolve them privately before filing a claim with the insurance provider. Regardless of the owner's preferred enforcement mechanism, though, the end result is a dispute resolution system wherein content

---

123. *Id.*

124. The USPTO has a graduated fee structure for maintaining patents. See <http://www.uspto.gov/web/offices/ac/qs/ope/fee031913.htm> (last visited Apr. 21, 2013).

125. See, e.g., *The Murphy Door Bed Co., Inc. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 101–02 (2d Cir. 1989).

126. See, e.g., *O'Keefe v. Snyder*, 416 A.2d 862, 869 (N.J. 1980).

---

127. *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites (Part I & II): Hearing Before the Subcomm. on Intell. Prop., Competition, and the Internet H. Comm. on the Judiciary*, 112th Cong. 19 (Mar. 14, 2011) (statement of Maria A. Pallante, Register of Copyrights).

128. When Righthaven was still filing lawsuits, the Las Vegas Sun, and blogs such as TechDirt and Ars Technica, provided regular coverage and commentary on the proceedings.

producers have more control in how their rights are enforced, and where they are more likely to receive compensation for their harm.

### C. How Will Copyright Insurance Work?

Just as the theoretical underpinnings of and justifications for copyright insurance are fairly straightforward, so to is its application to real world situations. In the introductory section of this Note involving the Matthew Inman and FunnyJunk, copyright insurance would have solved the problem quickly, effectively, and fairly, and it would have conferred a benefit on each party involved. Mr. Inman would have received compensation for his injury, FunnyJunk would have saved the expense of an attorney, its attorney would have avoided personal humiliation and unwanted attention, the insurance company would have received premiums from Mr. Inman, and taxpayers would have been spared the expense of federal litigation.

#### 1. Copyright Insurance and The Oatmeal

When Mr. Inman first noticed that his works were being infringed, he used self-help in the form of a DMCA takedown notice to protect his property. With a simple copyright insurance policy, though, the dispute would have ended almost before it began. Mr. Inman could have filed a claim for copyright infringement rather than attempt to resolve the problem on his own. He would have been compensated for the damage caused by the unauthorized posting, and the insurance company would have approached FunnyJunk about its infringing activity. Faced with a demand from the insurance company, FunnyJunk would have been more diligent in its efforts to remove the infringing material, as continued violations would have almost certainly lead to litigation and a settlement demand. Furthermore, because the owners of other material on FunnyJunk's website would likely have copyright insurance, FunnyJunk would have more incentive to thoroughly police its site, as each instance of infringement would be more likely pursued by an insurance provider.

Because the potential of a lawsuit by an insurance company would have made FunnyJunk police its site more diligently, Mr. Inman would not have felt the need to use public opinion in his fight to stop the unauthorized use of his work. Accordingly, all of the charges leveled against Mr. Inman would have never been filed, and neither party would have borne the

expense of attorney's fees and court costs. Under the copyright insurance system, then, infringement disputes would be more likely to be resolved in their early stages, and the chances of such dramatic escalation would be greatly reduced.

#### 2. The Business Model for Copyright Insurance

Copyright insurance will benefit content producers, and will allow insurance companies to profit while doing so. In addition to receiving premiums, insurance companies will, through subrogation, acquire the right to sue for infringement on behalf of their policyholders. With two options for making a profit, both the insured and insurer will be in a better position than they would have been without the insurance policy.

First, insurance companies will charge a premium that guarantees them a profit. Policyholders will be able to buy as much or as little insurance as they need or want, which will affect the amount of the premium. The insurance company will use the amount for which the copyright is insured in conjunction with the likelihood of infringement to calculate the premium. The resulting payment will allow the insurance company to compensate the policyholder for each instance of infringement while still being able to make a profit.

Once the insurance company pays the policyholder for its injury, it will acquire the legal right to seek compensation from the offending party.<sup>129</sup> Although this will not always result in litigation, if the infringement causes significant harm, the insurance company will be able to fully litigate the claim to receive the compensation it is entitled to. Because copyright law will be a primary part of its business, it will be able to conduct the litigation more cheaply and more effectively than most. Accordingly, the insurance company will be in a better position to settle claims, and will often be able to acquire adequate compensation without fully trying the case. Furthermore, even if the case is fully litigated, the insurance company will have a variety of remedies to choose from,<sup>130</sup> including the option to recover attorneys' fees,<sup>131</sup> which means it will have a better chance of recovering its losses through the court.

---

129. See discussion *supra* note 115.

130. 17 U.S.C. §§ 502–505 (2006) (providing the remedies for copyright infringement include injunctions, attorney's fees and injunction, costs, and damages as well as and profits).

131. *Id.* § 505.

Copyright insurance is pragmatic both in theory and in its application. It provides content producers with an effective tool to fight copyright infringement, as well as a method through which to receive adequate compensation. Copyright insurance also enables insurance companies to provide remedies to injured creators while still generating profits. Furthermore, its accompanying economic incentives will encourage insurance companies to avail themselves of the court system only to pursue the worst offenders. The result will be a simple system that efficiently and comprehensively solves the problem of online copyright infringement.

### III. CRITICISMS OF COPYRIGHT INSURANCE

Copyright insurance provides an effective, efficient, and affordable solution to mass copyright infringement. Granted, critics of this concept argue that the fair use doctrine will make copyright insurance ineffective, that insurance providers will coerce settlement agreements, and that the owners will profit at the content providers' expense. Each criticism addresses a legitimate area of concern. Still, while copyright insurance may have various negative consequences, the probability that they will occur is remote. Even so, the benefit that will accrue to society under this program outweighs the criticisms presented.

#### A. The Fair Use Doctrine Will Not Render Copyright Insurance Ineffective

An argument that opponents could make is that the fair use doctrine renders it too difficult for insurance companies to predict copyright infringement and insure the content providers yet remain profitable organizations. The fair use doctrine is an affirmative defense against a claim of copyright infringement.<sup>132</sup> For example, if charged with copyright infringement, a defendant may claim that, although he did use the work, his use was a "fair use" and, therefore, not an infringement. Doing so would constitute an absolute defense against copyright infringement claims.<sup>133</sup> One could argue that this, in turn, could render the program unprofitable and thus ineffective.

Although this argument demonstrates a valid flaw within the copyright insurance system, it is unlikely that this deficiency presents a significant

handicap to the program. Firstly, disputes between providers and policyholders over whether an infringing use is a fair use will be rare. Secondly, fair use will not make copyright insurance unpredictable to the point of unprofitability. Thirdly, while fair use is considered a broad and vague area of copyright law, courts have already consistently applied this doctrine, enabling insurance companies to make informed decisions as to fair use. Lastly, the perceived vagueness of fair use does not display enough risk factors to discourage insurance providers from entering the copy right insurance business.

To begin with, insurance providers are generally required by law to provide an explanation of the denial of a claim.<sup>134</sup> A disgruntled policyholder would be able to provide outside counsel with the provider's opinion of why the use was fair. If the policyholder's attorney agreed with the assessment of the fair use claim, the dispute would most likely be dropped. Alternatively, if the provider's explanation were deemed unacceptable, the policyholder would still have a right to pursue the infringer independent of the insurer, and, depending on the jurisdiction, may have the option to seek tort,<sup>135</sup> contract,<sup>136</sup> or statutory<sup>137</sup> remedies against the provider for denying the claim in bad faith. The provider's potential liability is an incentive for it to handle claims fairly. The policyholder's ability to sue after his claim is denied also prevents insurance providers from exercising too much power over copyright litigation, and demonstrates that the copyright insurance program is feasible.

Additionally, insurance providers regularly insure businesses against claims of copyright infringement as part of standard commercial general liability policy.<sup>138</sup> Accordingly, there exists a

134. See, e.g., 215 ILL. COMP. STAT. § 5/154.6(n). ("Any of the following acts by a company . . . constitutes an improper claims practice . . . . Failing in the case of the denial of a claim or the offer of a compromise settlement to promptly provide a reasonable and accurate explanation of the basis in the insurance policy or applicable law for such denial or compromise settlement.").

135. See, e.g., *Sanderson v. Allstate Ins. Co.*, 738 F. Supp. 432, 435 (D. Colo. 1990) (citing *Williams v. Farmers Insurance Group, Inc.*, 781 P.2d 156 (Colo. App. 1989)); see also *id.* (holding that the state's insurance law did not preclude a common law action for bad faith claim denial).

136. See, e.g., *Chamberlaine & Flowers, Inc. v. Smith Contracting, Inc.*, 341 S.E.2d 414, 417 (W. Va. 1986) (holding that failure to pay an insurance claim is nonfeasance, rather than misfeasance, and therefore a contractual claim).

137. See, e.g., MO. REV. STAT. § 375.420 (2012); 40 PA. CONS. STAT. § 1171.5(10) (2012).

138. The standard form commercial general liability policy, as provided by the Insurance Services Office, extends coverage for advertising injuries, which it defines as an "injury arising out of an offense committed during the policy period occurring in the course

132. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Option, 1978-2005*, 156 U. Pa. L. Rev. 549, 549 (2008); see also 17 U.S.C. § 107 (2006).

133. See 17 U.S.C. § 107.

significant body of relevant history and applicable case law.<sup>139</sup> Using this data insurance companies could determine the likelihood of a given work being infringed, and furthermore the likelihood of that use being a fair use. Incidentally, Professor Barton Beebe published an empirical study of fair use litigation in which he detailed the win rates of fair use defendants.<sup>140</sup> Insurance providers, as statistic-generating machines, should be capable of distilling the same elements Professor Beebe studied and reformulating them to fit their needs. This would allow the companies to profitably predict fair use and reinforce the effectiveness of the copyright insurance program.

Furthermore, despite the perception that the fair use doctrine is part of a broad and vague area of copyright law,<sup>141</sup> courts have already applied this doctrine with consistency.<sup>142</sup> The doctrine is uniformly applied to an extent that most judges discuss it formulaically and rather mechanically.<sup>143</sup> Accordingly, insurance providers could incorporate this data into their models that determine where to set their premiums. Because they could make case-by-case judgments of whether a use is fair, this insurance program will work.

Finally, insurance providers would not be dissuaded from entering a copyright insurance market as they regularly insure products whose level of risk is difficult to predict on a case-by-case basis.<sup>144</sup> For example, individuals regularly insure their cars against accidents, and their homes against floods, fires, and tornados. At an individual level, the contingency insured against is extremely difficult to predict. In contrast, by pooling<sup>145</sup> clients and evaluating the risk in a large sample of individuals, the insurance provider is able to predict the average rate of risk. In copyright

insurance, this translates to insurance providers establishing a rate at which its clients will win or lose fair use arguments, and to the notion that an insurance program is feasible.

Because there is data to show the probability of a successful fair use defense,<sup>146</sup> insurance providers could calculate the amount of risk inherent in copyright insurance and will be able to plan accordingly.

## B. Copyright Insurance Providers Will Not Bully Fair Users Into Settlement Agreements

Another criticism of copyright insurance is that insurance providers will adopt the trollish tactics of Righthaven by bullying ill-equipped parties into costly settlement agreements. Because the law does not prevent copyright owners from using aggressive tactics to protect their works, opponents of copyright insurance will argue that insurance providers will use their size and sophistication to unfairly negotiate settlement payments. The insurance providers, in contrast to Righthaven, would have legal standing to sue,<sup>147</sup> and as a result the threat of a lawsuit would be much more potent.

First, copyright insurers are not likely to seek improper settlement agreements from legitimate users because they will only be able to pursue the claims that they have honored. As the insurance company will have to pay its policyholder before it can acquire the right to sue,<sup>148</sup> it will be incentivized to only pursue cases from which it can profit. Accordingly, an insurance provider will not pursue infringers unless those infringers will be able to pay an amount that is greater than the cost of both the claim and the resources spent on the settlement or litigation efforts.

The reason Righthaven pursued so many questionable claims is that it usually only had to pay the cost of demanding and negotiating the settlement.<sup>149</sup> If a defendant with a meritorious defense did not acquiesce, Righthaven could always dismiss the case and cut its losses.<sup>150</sup> Because it did not have to invest

---

of the named insured's advertising activities, if the injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition or infringement of copyright, title or slogan."

139. See, e.g., *Euroconcepts, Inc. v. Hartford Cas. Ins. Co.*, 378 F. App'x 716 (9th Cir. 2011); *Delta Computer Corp. v. Frank*, 196 F.3d 589 (5th Cir. 1999).

140. Beebe, *supra* note 132.

141. See R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 *FORDHAM L. REV.* 423, 431 (2005).

142. Beebe, *supra* note 132, at 584 (noting that the outcomes of the first and fourth elements of the fair use test correspond with the outcome of the case 81.5% and 83.8% of the time, respectively).

143. *Id.* at 561.

144. STATISTICS, NAIC, [http://www.naic.org/cipr\\_statistics.htm](http://www.naic.org/cipr_statistics.htm) (last visited Feb. 23, 2013).

145. Pooling refers to the practice of assessing the risk within a large group of products. By determining the rate at which the contingency will occur within the group, the insurance provider is able set its premiums at a level that will guarantee profitability.

---

146. Beebe, *supra* note 132.

147. See discussion *supra* note 115.

148. *Id.*

149. In many cases, Righthaven simply had to pay the sixty-five dollar fee to register its copyright in the infringed work, send a standard cease-and-desist letter to the infringer, and then negotiate a settlement. See Steve Green, *Attorneys Accuse Righthaven of Settlement Shakedown*, *LAS VEGAS SUN* (Oct. 8, 2010, 1:50 AM), <http://www.lasvegassun.com/news/2010/oct/08/attorneys-accuse-righthaven-settlement-shakedown>.

150. *FED. R. CIV. P.* 41(a)(1) (allowing a plaintiff to voluntarily dismiss an action). Righthaven did this twenty-nine



significant resources into pursuing an infringer, like an insurance provider will have to do via payment of the claim, Righthaven was able to shake down potential infringers with little regard for the consequences of its acts.<sup>151</sup> If it had been required to compensate its clients before it could pursue infringers, it is likely that Righthaven would have only sued users that caused legitimate harm.

Second, copyright insurance providers will not adopt trollish tactics because they will want to maintain a good reputation with their clients and potential customers. As business entities, insurance providers will compete with each other for market share.<sup>152</sup> In addition to providing quality services, they will also have to gain and keep the trust of their customers. Judging by the almost universal hatred with which the judiciary and the general public view Righthaven,<sup>153</sup> few insurance providers, if any, will be willing to embark on a similar path.

Third, as between the content producer and the content infringer, it is better for society that the law favors the producer. The content producer invests her time, money, and creative energy into bringing new works into existence. Conversely, the infringer merely redistributes the work of others for his own personal gain. While high litigation costs deter the producer from protecting her intellectual property, they should be used instead to deter infringers from stealing others' creative output.

### C. Copyright Insurance Will Not Unfairly Benefit Insurance Providers and Content Producers at the Expense of Fair Users and Free Speech

Finally, opponents of copyright insurance argue

---

times during its filing stint. Most of the voluntary dismissals occurred in the last months of 2011. For the complete list, see *Comprehensive List of Copyright Infringement Lawsuits Filed By Righthaven, LLC*, RIGHHAVEN LAWSUITS, <http://righthavenlawsuits.com/lawsuits.html> (last visited Apr. 21, 2013).

151. For example, Righthaven unknowingly sued an autistic blogger on a fixed income in early 2011. See *Righthaven, LLC v. Hill*, No. 1:11-CV-00211 (D. Colo. Sept. 9, 2011).

152. *Auto Insurance*, INS. INFO. INST., [http://www.iii.org/facts\\_statistics/auto-insurance.html](http://www.iii.org/facts_statistics/auto-insurance.html) (last visited Feb. 23, 2013) (showing that in 2011, the market share controlled by the top ten private automobile insurers were, with one exception, within two percentage points of each other. This indicates healthy competition in the industry).

153. See, e.g., *Righthaven LLC v. Democratic Underground LLC*, 791 F. Supp. 2d 968, 979 (D. Nev. 2011) (ordering Righthaven to show cause as to why it should be sanctioned for "flagrant misrepresentation" to the court). A simple Google search for "Righthaven" yields a plethora of sites devoted criticizing the organization.

that it will improperly benefit insurance providers and content producers at the expense of infringing fair users and free speech in general. Because copyright insurance would give producers more effective ways to prevent their works from being infringed,<sup>154</sup> it would necessarily increase a copier's liability for infringement, and accordingly produce a "chilling effect" on the exchange of ideas and information. As copyright exists to increase creative expression, such a system would run contrary to the fundamental values of copyright law, and of American jurisprudence in general.

While this objection raises a legitimate concern as to the effect of copyright insurance on society as a whole, it is unlikely to cause significant problems, and, even if it does, the benefits of the program far outweigh its costs.

First, it is doubtful that copyright insurance will have a significant chilling effect on the free exchange of information. In fact, the law specifically exempts pure information from copyright protection.<sup>155</sup> Rather, only certain forms of expression may be copyrighted.<sup>156</sup> For example, a newspaper article is protected under copyright law, but the underlying story cannot be copyrighted.<sup>157</sup> Therefore, an insurance provider will only obtain the enforcement rights to a particular expression, not to the underlying content. These rights cannot be used to stifle the legitimate flow of ideas, only the illegitimate copying of protected expression.

Second, copyright law incentivizes creativity by granting producers a limited monopoly over their works,<sup>158</sup> and not by encouraging copiers to infringe with impunity. Because copiers do not provide society with anything new, the law does not protect their activity, and further considers it as offense to content producers.<sup>159</sup> Accordingly, although copyright insurance will undeniably decrease the amount of free information available to the public,<sup>160</sup> it will only do so

---

154. See discussion *supra* Part III.B.1.

155. 17 U.S.C. § 102(b) (2012) ("In no case does copyright protection for an original work of authorship extend to any *idea*, procedure, process, system, method of operation, *concept*, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.") (emphasis added).

156. *Id.* § 102(a).

157. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) ("In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it.").

158. 17 U.S.C. § 106.

159. See *id.* § 501.

160. See *supra* pp. 5–8.



with the protected works that would not have been free but for their infringement.

Third, even if legitimate users of copyrighted materials are harmed by copyright insurance, the increased incentive to create new works provided by insurance will yield a net benefit to society. Currently, because enforcing copyrights is so expensive,<sup>161</sup> unauthorized copiers operate at an advantage over producers. They can infringe with impunity up to a certain point, knowing that their actions must cause a certain amount of harm before they will incite the owner to action. However, by making copyrights easier to enforce, copyright insurance will give producers better footing in their fight against infringers, and essentially lower the threshold at which infringers operate. Ultimately, because producers provide new works and ideas, and infringers merely freeload off of the producers, society will benefit if the producer is given more rights.

## CONCLUSION

Mass online copyright infringement remains a serious problem in the American economy. While copyright owners have struggled to find effective enforcement mechanisms, their neighbors in patent law have found a mechanism by which they can efficiently protect their rights. In patent law, third-party enforcement via non-practicing entities has been an incredibly successful method for pulling value from patents, fighting infringement, and providing additional sources of capital for individual inventors. Accordingly, to acquire similar benefits, copyright law should annex the basic principle of third-party enforcement and transform it into copyright insurance.

By developing a robust copyright insurance system, copyright owners would benefit from increased compensation for infringement, more value in their works, and the services of a sophisticated and professional organization for litigation. Professional copyright enforcement would discourage would-be infringers from their illegitimate activity, and thereby increase the profitability of content producers. Furthermore, copyright insurance is well suited to existing law, will have a minimum impact on legitimately fair uses of protected works, and will encourage, rather than stifle, the creation of new ideas. Overall, copyright insurance is the most equitable solution to the problem of mass online copyright infringement.

---

161. AM. INTELL. PROP. LAW ASS'N, *supra* note 37.